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No. 105, Original

IN THE

Supreme Court of the United States

October Term, 1985

STATE OF KANSAS,
Petitioner,

v.

STATE OF COLORADO,
Respondents.

COLORADO'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT.

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INTRODUCTION

The State of Colorado respectfully requests the Court to deny the Motion for Leave to File Complaint filed by the State of Kansas. The complaint alleges material depletion of the waters of the Arkansas River in Colorado in violation of the Arkansas River Compact.[1] Colorado submits that Kansas has not made a reasonable effort to resolve this matter through the Arkansas River Compact Administration ("Administration").[2] Absent such an effort, this Court should decline to hear this matter.

Contrary to the suggestion by Kansas, there is substantial disagreement as to whether post-compact well development in Colorado has materially depleted the flow of the Arkansas River in violation of Article IV.D. and/or Article V.F. of the Arkansas River Compact. The Court should deny the motion for leave to file a complaint because Kansas has an adequate means for vindicating its concerns through a pending investigation by the Administration. *See Texas v. New Mexico,* 462 U.S. 554, 571 n. 18 (1983). Premature invocation of the Court's jurisdiction would deny the Court the benefit of the special

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[1]The United States Congress granted consent to Colorado and Kansas to negotiate a compact for the apportionment of the waters of the Arkansas River in 1945. Act of April 19, 1945, 59 Stat. 53. The Arkansas River Compact was signed by the commissioners appointed by Colorado and Kansas on December 14, 1948. The Compact was ratified by the legislature of each state and approved by Congress in 1949. Act of May 31, 1949, 63 Stat. 145. The Compact ended nearly fifty years of litigation over the use of waters of the Arkansas River. *See* Kansas v. Colorado, 206 U.S. 46 (1907); Colorado v. Kansas, 320 U.S. 383 (1943).

[2]The Arkansas River Compact Administration is an interstate agency created by the Arkansas River Compact to administer the provisions of the Compact. Art. VIII.A. The membership of the Administration consists of three representatives from each state appointed by the respective governors. Art. VIII.C. Each state has one vote in the Administration. Art. VIII.D.

expertise and abilities of the Administration in addressing complex hydrologic facts about ground water usage and would saddle this Court with burdensome original jurisdiction litigation over complaints that can be resolved or narrowed by the Administration.[3] *Id.; Far East Conference v. United States,* 342 U.S. 570, 574-75 (1952). In that regard, Colorado agrees with the United States Representative to the Administration[4] that the Arkansas River Compact obligates a complaining state to make a reasonable effort to pursue resolution through the mechanisms provided for in the Compact before resorting to litigation against the other compacting state.[5] Colorado also agrees with the United States Representative that Kansas has not followed

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[3]The Compact directs the Administration to investigate promptly violation of any of the provisions of the Compact or other actions prejudicial thereto which come to its attention. Art. VIII.H; *see also* Art. VIII.G. relating to the fact-finding duties of the Administration. When deemed advisable as the result of an investigation, the Administration can report its findings and recommendations to the state official charged with administration of water rights for appropriate action. Art. VIII.H. Findings of fact made by the Administration are not conclusive, but do constitute *prima facie* evidence of the facts found. Art. VIII.J. This provision is nearly identical to Article V(f) of the Pecos River Compact. *See* Texas v. New Mexico, 462 U.S. 554, 568 n. 14 (1983).

[4]The Compact provides for the President to designate a representative of the United States to the Administration to act as chairman but without vote. Art. VIII.C.

[5]*See* Remarks of the U.S. Representative to the Arkansas River Compact Administration at the annual meeting of the Administration held in Pueblo, Colorado. (Dec. 10, 1985) (printed in Appendix A). However, Colorado does not agree with the suggestion by the U.S. representative that it is essential that there be an arbitration of every dispute under the Compact. Article VIII.D. of the Compact merely provides that in the case of a divided vote on any matter within the purview of the Administration, the Administration "may" refer a matter for arbitration by a subsequent unanimous vote of both states. Whether arbitration is appropriate to resolve a matter under the Compact depends on agreement of the states on a case-by-case basis.

"those procedures which appear to me clearly to be reasonable and necessary before either [state] successfully claims that its administrative remedies have been exhausted and that it must seek relief outside or beyond the Compact Administration."[6]

STATEMENT OF THE QUESTION PRESENTED

Has the State of Kansas met its burden to demonstrate that a pending investigation by the Arkansas River Compact Administration is not an adequate means to vindicate its allegations of Compact violations?

SUPPLEMENTAL STATEMENT OF FACTS

Colorado supplements the statement of facts in the Kansas brief to permit the Court to determine whether Kansas has met its burden to demonstrate the necessity of an original forum in this Court.

A. Administration Investigation

On March 28, 1985, at the request of Kansas and Colorado, the Administration adopted a resolution, by unanimous vote, to investigate a number of allegations of violations of the Compact, including well development in both states. *See* Kansas Brief at 4. The resolution established a committee consisting of the director of the Colorado Water Conservation Board or his designee and the Chief Engineer of Kansas or his designee to conduct the investigation.[7] Beginning in April, 1985, the com-

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[6]Appendix A at 4a.

[7]The director of the Colorado Water Conservation Board and the Chief Engineer of the Kansas Division of Water Resources are *ex officio* members of the Administration. Art. VIII.C. Both agencies have considerable expertise in conducting water investigations. *See, e.g.,* Colo.Rev. Stat. §37-60-101, *et seq.* (1973), as amended, for the powers and duties of the Colorado Water Conservation Board. In addition, the Compact provides that state officials shall furnish pertinent factual data to the Administration upon its request. Art. VIII.G. (1). The director of the U.S. Geological Survey, the commissioner of the U.S. Bureau of Reclamation, and the chief engineer of the U.S. Army Corps of Engineers are also requested to assist the Administration in the execution of its duties. Art VIII.G(2).

mittee devoted substantial efforts to establishing a data base and preparing a mass diagram analysis to determine if there had been any changes in the relationship between streamflows at selected locations in the Arkansas River Basin. *Id.* at 5.

On July 12, 1985, at the request of the Kansas representatives, the Administration agreed to amend the March 28, 1985 resolution to include an investigation of whether Colorado had complied with the provisions of Article V.F. of the Compact concerning the administration of decreed rights in Colorado on the basis of relative priorities. See Kansas Brief at 4.

On October 8, 1985, after extensive reports were submitted by both committee members on the status of the investigation, the Administration expressly authorized the committee to "continue with its investigation of the matters upon which the Committee has mutually agreed that further investigation should be undertaken."[8]

Approximately two weeks later, on October 25, 1985, Kansas Attorney General Robert Stephan announced to an interim committee of the Kansas legislature that effective relief was not available through the Administration and that he had directed his staff to initiate litigation against Colorado to be filed on December 16, 1985. Topeka Capital J., Oct. 26, 1985, at 1, Col. 1.

To understand the reason for the disagreement between the Kansas Attorney General and the Administration on how the investigation should proceed, the following background facts concerning well regulation in the Arkansas River Valley in Colorado are necessary.

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[8]Resolution adopted at Arkansas River Compact Administration meeting held at Garden City, Kansas (Oct. 8, 1985) (printed in Appendix B).

B. Background Facts

Prior to 1965, the Colorado State Engineer believed he had no authority to regulate ground water diversions. *See Fellhauer v. People,* 167 Colo. 320, 328, 447 P.2d 986, 990 (1968). In 1965, the Colorado General Assembly enacted legislation to vest the State Engineer with clear authority to regulate ground water diversions in the priority system and to regulate the issuance of new well permits. The Colorado water officials then attempted to curtail out-of-priority diversions by a group of wells in the Arkansas River Basin. The Colorado Supreme Court held that this attempt to enforce the 1965 legislation was unconstitutional and set forth three requirements for the valid and constitutional regulation of wells in the Arkansas River Valley. *Id.* at 334-35, 447 P.2d at 993. The District Court's decision in that case prompted the Colorado General Assembly to authorize an investigation to determine, *inter alia,* the need for legislation that would provide for integrated administration of surface and ground water. 1967 Colo. Sess. Laws, Ch. 175, §1. One of the studies prepared in connection with this investigation is the first of the three studies cited in the Kansas brief. W. W. Wheeler and Associates and Woodward-Clyde & Associates, Water Legislation Investigations for the Arkansas River Basin in Colorado (1968).

In 1969, the Colorado General Assembly enacted the Water Right Determination and Administration Act of 1969. Colo. Rev.Stat. §37-92-101, *et seq.* (1973), as amended (hereinafter the "1969 Act"). On November 16, 1972, pursuant to the authority granted in the 1969 Act to integrate the administration of surface and tributary ground water in the Arkansas River Valley, the Colorado State Engineer promulgated rules and regulations to progressively curtail ground water uses in the Arkansas River

Valley four days a week to protect senior appropriators.[9] These rules have been in continuous effect for the past thirteen years.

On January 4, 1974, the State Engineer proposed an amendment to the rules and regulations to further curtail ground water uses. Protests to the amendment were filed by various well owners under the provisions of the 1969 Act providing for notice and an opportunity to be heard prior to the enforcement of amendments to existing rules and regulations. Colo.Rev.Stat. §37-92-501(2) (f)-(h). After hearings on protests to the amendment, the Colorado Water Judge for Water Division No. 2[10] entered a judgment disapproving the proposed amendment and ordered that the existing rules and regulations be continued in effect. *In re the Amendment of the Rules and Regulations Governing the Use, Control and Protection of Surface and Ground Water Rights Located in the Arkansas River and Its Tributaries,* Case Nos. W-4079, W-4080, W-4083, W-4084, and W-4085 (Dist. Ct., Water Division No. 2, Dec. 1, 1976), *aff'd sub. nom. Kuiper v. Atchison, Topeka & Sante Fe Ry.,* 195 Colo. 557, 581 P.2d 293 (1978).

The Water Judge found that notwithstanding the theoretical analyses offered by the State Engineer to support his contention that wells had depleted surface flows of the Arkansas River, there was no competent evidence in the record that stream flows had in fact suffered during the post-well period or that reduc-

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[9]Hillhouse, *Integrating Ground and Surface Water Use in an Appropriation State,* 20 Rocky Mountain Min. L. Inst. 691 (1975), describes Colorado's efforts to regulate ground water up to that time.

[10]Under the 1969 Act, Colorado was divided into seven water divisions based on major drainage basins and sub-basins. Colo.Rev.Stat §37-92-201. A district judge in each water division was designated as a "water judge" with exclusive jurisdiction over "water matters." Colo.Rev.Stat. §37-92-203(l) (1985 Cum. Supp.). The Arkansas River and its tributaries in the State of Colorado were included in Water Division No. 2. Colo.Rev.Stat. §37-92-201(1)(b).

tions, if any, could be traced to well diversions rather than to other causes, including increased irrigation efficiencies, phreatophyte and evaporation losses, or declines in tributary inflow. The Water Judge considered the reports cited in the Kansas brief but concluded that they ignored numerous factors which could increase or decrease river flow and were based on assumptions about ground water diversions which were not supported by competent evidence. The Water Judge's decision was affirmed on appeal by the Colorado Supreme Court. *Kuiper v. Atchison, Topeka & Sante Fe Ry., supra.* It was against this background that the committee began its investigation of well development in Colorado.

POINTS OF LAW

The Court exercises its original jurisdiction sparingly. *United States v. Nevada,* 412 U.S. 534, 538 (1973). The Court recently stated that it has "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction." *Texas v. New Mexico,* 462 U.S. 554, 570 (1983).

Where a compact creates an interstate agency to administer the provisions of the compact, and that agency is directed to investigate violations of the provisions of a compact and to report its findings and recommendations to the state officials charged with the administration of water rights for appropriate action, a compact provides an adequate means for vindicating either state's complaints of compact violations, in the absence of unusual circumstances, such as bad faith, inability to act, or undue delay. *See Texas v. New Mexico,* 462 U.S. 554, 571 n. 18 (1983). This is analogous to the doctrine of primary jurisdiction which

> applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim

> requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pacific R. R., 352 U.S. 59, 64 (1956). The doctrine is based on the principle

> that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of adminstrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.

Far East Conference v. United States, 342 U.S. 570, 574 (1952).

SUMMARY OF ARGUMENT

Colorado believes that there are persuasive reasons to deny the Motion for Leave to File Complaint. To summarize:

1. there is a pending investigation by the Administration of post-compact development in Colorado and Kansas;
2. the Administration is not deadlocked or unable to act, but has been proceeding in a cooperative manner to conduct the investigation;
3. the investigation of well development in Colorado raises complex issues of fact "not within the conventional experience of judges," *Far East Conference v. United States,* 342 U.S. at 574;
4. passing over the Administration would deny the Court the special expertise of the Administration in adressing complex hydrologic facts concerning ground water use and would burden the Court with a dispute that might be resolved by the Administration; and

5. there is little likelihood of injury while the investigation continues.

ARGUMENT

Kansas urges the Court to grant its motion for leave to file its complaint on the grounds that it made an attempt to have the Administration investigate its complaints, but the investigation is proceeding at a "snail's pace" and Colorado "has followed and continues to follow a course of conduct that renders the administrative investigation a meaningless effort designed to delay a resolution of the conflict." Kansas Brief at 8, 9. The facts simply do not support these contentions. First, Kansas did not request the Administration to investigate its principal allegation concerning post-compact well development in Colorado until March 28, 1985. Second, the Colorado representatives did not refuse to investigate the substance of the Kansas allegation. Third, there is substantial disagreement over the facts which can only be resolved by further investigation.

A. The Arkansas River Compact Administration Has Not Had A Reasonable Opportunity To Investigate The Kansas Allegation That Well Development In Colorado Has Materially Depleted Stateline Flows In Violation Of The Compact.

The principal allegation in the proposed complaint is that post-compact well development in Colorado has materially depleted the flow of the Arkansas River in violation of Article IV.D. of the Arkansas River Compact. Complaint, ¶ 8-10; Kansas Brief at 1.

Kansas admits, however, that the well development of which it complains occurred almost exclusively *prior to 1965.* Kansas Brief at 3. Nevertheless, and despite its allegation that since 1974 there has been a substantial decrease in usable stateline flows, *id.* at 2, it was not until March 28, 1985, that Kansas, *for*

the first time, requested the Administration to investigate whether well development in Colorado had caused material depletion to the waters of the Arkansas River. The Kansas brief implies that well development in Colorado had been the subject of discussion by the Administration for several years:

> *After Colorado's ground water depletions became manifest on surface flows at the stateline,* Colorado's deficient *administrative practices* above John Martin Reservoir were raised by Kansas at meetings of the Arkansas River Compact Administration, the interstate body created to administer the provisions of the Compact . . . . Numerous special and regular meetings of the Administration were devoted to discussion of the *problems,* but essentially no progress was made toward their resolution. In 1982, the Attorneys General of both states met with the Administration to clarify the *issues.* After nearly two years of discussions and a protracted exchange of correspondence, the *matter* was brought to a head by an unsuccessful attempt by Kansas to initiate arbitration pursuant to Article VIII(D) of the Compact . . .

Kansas Brief at 3-4 (emphasis added) (citations omitted).

By the use of the terms "administrative practices," "problems," "issues," and "matter," Kansas seeks to convey the impression that these efforts related to its allegation concerning ground water depletions in Colorado. This is not true. The events described in the above-quoted passage from the Kansas brief related to disputes over the operation of Trinidad Reservoir and Pueblo Reservoir in Colorado. *See infra* pp. 17-18. It was not until March 28, 1985, that Kansas requested the Administration to investigate well development in Colorado. At that time the Administration agreed to investigate a number of allegations of violations of the Compact, including well development in both states. *See* Kansas Brief at 4.

As noted in Colorado's supplemental statement of facts, after extensive reports were submitted, the Administration authorized the committee to continue with the investigation on October 8, 1985. The assertion that the pending investigation was proceeding at a "snail's pace" and was a "meaningless effort designed to delay a resolution of the conflict," Kansas Brief at 8, 9, was made by the Kansas Attorney General, not by the Kansas representatives to the Administration, who authorized the investigation to continue on the basis of matters mutually agreed to by the committee established to conduct the investigation.[11]

B. The Colorado Representatives Did Not Refuse To Investigate The Substance Of The Kansas Allegation Concerning Well Development In Colorado.

Kansas briefly notes the substantial effort devoted to the investigation by the committee to establish a data base and prepare a mass diagram analysis of streamflows at selected locations in the Arkansas River Basin. Kansas Brief at 5. The committee then submitted reports to the Administration prior to its October 8, 1985 meeting. Kansas summarizes the report by the director of the Colorado Water Conservation Board as follows:

> The Colorado report concluded that the mass analyses indicated no significant historic depletions, with the possible exception of tributary inflow from the eastern plains of Colorado. Accordingly, Colorado took the position that only "plains precipitation during the period 1974-1982 is a matter that warrants further investigation." ['Memorandum to the Arkansas River Compact Administration,' J. William McDonald, October 4, 1985] p. 22.

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[11]Despite the Kansas Attorney General's announcement on October 25, 1985, the committee proceeded in good-faith with the investigation and met on November 19, 1985, and again on December 10, 1985.

Kansas Brief at 6. This misstates the conclusions and recommendations in the report to the Administration by Mr. McDonald, the director of the Colorado Water Conservation Board. Mr. McDonald's report first set forth points of agreement in previous committee reports and the basis for his conclusions drawn from the mass diagrams prepared during the investigation:

> First, I agree with Mr. Pope [the Kansas Chief Engineer] that there was a substantial decline in usable stateline flows starting in 1974, although I believe this period should be divided at 1980 because changes in the operation of John Martin Reservoir starting in that year affected usable stateline flow. Second, I agree that the relationship between the annual flows of the Arkansas River at Canon City and Las Animas have been fairly constant over the entire post-compact period and that the causes of the decline in usable stateline flows starting in 1974 have been below Las Animas.
>
> Looking at the reach below Las Animas, I concluded that the decline in usable stateline flows from 1974-1979 coincided with a period of below-average flow at Las Animas and a period of drastic decline in tributary inflow from plains drainage areas of eastern Colorado, as reflected in the streamflow records of the Purgatoire River near Las Animas and Big Sandy Creek. I noted that there had been previous declines in usable stateline flows during drought periods, but that previous droughts have been broken up after two or three years by average or above-average flows, whereas the drought cycle in the 1970's lasted for a period of six years before there was a return to average and above-average flows. Further, I noted that usable stateline flows began improving in 1980 when precipitation and streamflow began to recover throughout the basin. Therefore, I concluded that the decline in usable

stateline flows was directly related to a decline in tributary inflow from plains drainage areas, combined with below-average flows at Las Animas.

Memorandum from J. William McDonald to the Arkansas River Compact Administration, 4-5 (Oct. 4, 1985) (citations omitted). The report reviewed in detail the reasons for the disagreement as to the possible causes of the decline in usable stateline flows beginning in 1974 and then set forth matters which Mr. McDonald thought were appropriate for further investigation:

> As noted above, both reports are in general agreement that the changes in relationship shown by the double-mass curves occurring since 1974 have been below the Las Animas gage on the Arkansas River. This isolates the reach appropriate for further investigation.
>
> In my opinion, plains precipitation during the period 1974-1982 is a matter that warrants further investigation. In addition, tributary inflow from plains drainage areas may have declined during the period 1974-1979 as the result of soil conservation measures. Such conservation measures were found to have had a substantial effect on streamflow in the Republican River Basin. If, after an investigation of the factors which appear most likely to have caused the decline in usable stateline flows during the period 1974-1982, including: 1) reduced diversions by ditches in Colorado Water District 67; 2) the operating plan for John Martin Reservoir; 3) decreased plains precipitation; and 4) soil conservation measures, it does not appear that this decline can be entirely attributed to such factors, then a further investigation of possible causes may be justified. However, *at this time,* I cannot agree to undertake an investigation into well development in Colorado when the single and double-mass diagrams do not suggest that well development in Colorado has had an impact on usable stateline flows.

Id. at 22-23 (emphasis added).

At the Administration's meeting on October 8, 1985, Mr. McDonald amplified his report by saying that he was not refusing to investigate any potential cause of the decline in usable stateline flows, only that he did not feel that evidence justified the expense of developing a stream-aquifer computer model when there appeared to be more likely causes than well development for the decline in usable stateline flows beginning in 1974.[12]

Kansas then goes on to assert that on October 8, 1985, the Administration adopted a resolution "*terminating* the Article VIII (H) investigation except in the limited area of mutual agreement that the investigation should proceed." Kansas Brief at 7 (emphasis added). Kansas contends that Colorado thereby "refused to investigate the substance of Kansas' claims concerning the material depletions in usable stateline flows caused by certain administrative practices and the proliferation of unregulated postcompact wells." *Id.*

This mischaracterizes both the McDonald report and the Administration's resolution of October 8, 1985, which did not *terminate* the investigation; the resolution provided that the committee "shall *continue* with its investigation of the matters upon which the Committee has mutually agreed that further investigation should be undertaken." Appendix B (emphasis added). Thus, the disagreement was not over whether to investigate, but what to investigate first.

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[12]Minutes of Arkansas River Compact Administration meeting held at Garden City, Kansas, 31-32 (Oct. 8, 1985).

C. The Findings By The Colorado Water Court Demonstrate That There Is a Good-Faith Dispute As To Whether Well Development In Colorado Has Materially Depleted Stateline Flows.

Kansas asserts that well development is the "basic problem identified by all of the experts, including Colorado's own officers and consultants," Kansas Brief at 8, and that any suggestion to the contrary is merely "stonewalling" to "delay or obstruct the Administration's investigation of post-compact wells to avoid the inevitable determination that the wells were and are resulting in compact violation." *Id.* at 8, 9. The impression left by Kansas is that Colorado has made no effort to curtail diversions from post-compact wells despite the existence of reports suggesting that well development is the primary cause of post-compact depletions to flows of the Arkansas River. This misrepresents the facts.

The Colorado State Engineer believed that he did not have authority to administer well diversions prior to 1965. *See Fellhauer v. People,* 167 Colo. 320, 328, 447 P.2d 986, 990 (1968). Colorado, however, was not unique in this respect. Few states, Kansas being no exception, had adequate laws for the coordinated administration of surface and related ground water at the time.[13] However, since 1965, the Colorado State Engineer has made substantial efforts to regulate ground water diversions in the Arkansas River Valley. *See supra pp. 5-6.* As for the reports prepared for the Colorado State Engineer and the Colorado

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[13]Ironically, Kansas did not impose a moratorium on the issuance of new well permits in the Arkansas River Valley in Hamilton and Kearney Counties until 1977, at which time the Kansas Division of Water Resources entered into a five-year cooperative study with the United States Geological Survey to investigate ground water development in the moratorium area. R. Baker, L. Dunlap, B. Sauer, *Analysis and Computer Simulation of Stream-Aquifer Hydrology, Arkansas River Valley, Southwestern Kansas,* U.S.G.S. Water-Supply Paper 2200 at 1, 3 (1983). Hamilton and Kearney Counties are located in the Arkansas River Basin nearest the Colorado-Kansas stateline. *See* attached Map of Arkansas River Basin.

Water Conservation Board, the Colorado Water Court concluded that the theoretical analyses in those reports were not supported by empirical evidence based on streamflow records and that they ignored numerous factors besides well diversions which could increase or decrease river flow and were based on assumptions about ground water diversions that were not supported by competent evidence. While Colorado does not suggest that this decision is binding on Kansas, *see Hinderlider v. La Plata & Cherry Creek Ditch Co.*, 304 U.S. 92, 103 (1938), we do think that a presumption of correctness attaches to the decree under the Compact, which provides that it is "the intent of this Compact that enforcement of its terms shall be accomplished in general through the State agencies and officials charged with the administration of water rights." Art. VIII.H.

Thus, far from being the problem identified by all of the experts, there is substantial evidence that well development in Colorado has been offset by other factors. Every expert who has studied the regimen of the Arkansas River in Colorado, including S.S. Papadopulos & Associates, Inc., has noted that it is "a highly complex system that has been altered by the construction of canals, reservoirs, wells, and inter-basin diversion systems."[14]

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[14]S.S. Papadopulos & Associates, Inc., Report to the Arkansas River Compact Administration Regarding the Article VIII(H) Investigation of Alleged Violations of the Arkansas River Compact, 5 (Dec. 6, 1985). This six-page report was not requested by the Administration but was apparently prepared for the Kansas Attorney General to support the decision to initiate litigation against Colorado. The Papadopulos firm made no independent investigation of well development in Colorado, but merely reviewed the committee reports and various written reports, including those prepared for the Colorado State Engineer and the Colorado Water Conservation Board. The Papadopulos report simply concluded: "Given the complexity of water distribution and use in the Arkansas River Valley, it is imperative that additional investigations consider all factors that may have affected historical streamflow patterns." *Id.* at 6. No one disagrees that further investigation is necessary; the question is how to proceed.

These facts demonstrate that the investigation involves highly complex issues of hydrologic facts, that reasonable experts differ as to the conclusions drawn from the facts at this time, and that further investigation is indeed warranted. It is not the function of this Court to second-guess the Administration on how the investigation ought to be conducted. *See Texas v. New Mexico,* 462 U.S. 554, 570-71 (1983). Nor do the remaining allegations in the complaint support the claim that Kansas has no alternative but to invoke the original jurisdiction of this Court.

D. Other Matters Raised By Kansas Do Not Justify An Original Forum In This Court.

Kansas also alleges that the Colorado representatives to the Administration have rejected requests to investigate: 1) "Colorado's artifically transferring water from the storage pool in Trinidad Reservoir to the sediment pool and then refilling the storage pool to the detriment of downstream users;" 2) "the consequences of future increases in the consumption of Colorado's transmountain return flows;" and 3) "Colorado's unilateral rejection of the Arkansas River Compact Administration's Resolution of July 24, 1951, requiring that any reregulation of the native waters of the Arkansas River be approved by the Compact Administration." Complaint, ¶ 12.

First, with regard to the operation of Trinidad Reservoir,[15] the Colorado representatives did in fact agree to an investiga-

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[15]The Trinidad Project was authorized by the United States Congress in the Flood Control Act of 1958, 72 Stat. 297, 309, *amended by* Act of Oct. 27, 1965, 79 Stat. 1073, 1079. *See* attached Map of Arkansas River Basin. The reservoir was completed and declared ready for the impoundment of water on January 1, 1977; however, storage in substantial amounts did not begin until 1979 because of litigation among Colorado water users. *See* Purgatoire River Water Conservancy Dist. v. Kuiper, 197 Colo. 200, 593 P.2d 333 (1979) (reversing trial court order enjoining storage in the reservoir).

tion of storage in the reservoir under Article VIII.H. of the Compact at a special meeting of the Administration on June 30, 1980. Annual Report, Arkansas River Compact Administration, 47 (1980). At a special meeting on September 25, 1980, the Administration approved findings of fact concerning storage and transfer of water in Trinidad Reservoir during 1979 and 1980 based upon the results of the investigation authorized by the Administration. *Id.* at 12-15. However, the Colorado representatives did not agree that these facts established a violation of the Compact and further investigation was agreed to. *Id.* at 48.

Without reviewing the entire history of the controversy, it is sufficient to point out that Kansas subsequently asserted that Trinidad Reservoir was not being operated in conformity with Operating Principles for the project approved by Kansas and the Administration in 1967. However, that very issue is being addressed in a review by the U.S. Bureau of Reclamation required by the Operating Principles. A draft of this review was submitted to interested parties, including Kansas, on December 20, 1985, with a request for comments by February 15, 1986. Thus, Colorado did not refuse to investigate the operation of Trinidad Reservoir. Moreover, Kansas has adequate means to address its concerns about the operation of the project through the review process being conducted by the U.S. Bureau of Reclamation. *See United States v. Nevada,* 412 U.S. 534, 538 (1973); *Illinois v. Milwaukee,* 406 U.S. 91, 93-94 (1972).

Second, with regard to potential *future* increases in the consumption of transmountain return flows, the director of the Colorado Water Conservation Board concluded during the investigation that the potential consequences were speculative at this time and would be extremely difficult to determine. While Kansas is correct that the Colorado representatives refused to investigate the potential consequences of future increases in the consumption of transmountain return flows,

this is a hypothetical controversy which is not ripe for adjudication. *United Public Workers v. Mitchell,* 330 U.S. 75 (1947).

Third, with regard to the Administration's Resolution of July 24, 1951, the resolution expressed as a policy of the Administration that there be no reregulation of native waters of the Arkansas River as proposed in a report on the Gunnison-Arkansas Project until a plan of operation had been submitted to and approved by the Administration. When this matter was first raised by Kansas in 1982, the Colorado representatives did not agree that the resolution was applicable to the Fryingpan-Arkansas Project, a major transmountain water diversion project which was authorized by Congress in 1962, of which Pueblo Reservoir is a component. Act of August 16, 1962, 76 Stat. 389. However, even if the resolution were applicable to the Fryingpan-Arkansas Project, Colorado believes that the policy of prior approval set forth in the 1951 resolution was waived when the Administration failed to raise an objection to the winter storage program in Pueblo Reservoir for at least six years after it began operation in 1975 with the full knowledge of the Administration! Furthermore, the Colorado representatives agreed in the resolution of March 28, 1985, to investigate the operation of the winter storage program in Pueblo Reservoir, Kansas Brief at 4, notwithstanding the fact that the United States Geological Survey ("U.S.G.S.") had performed a review of the potential reduction of inflow to John Martin Reservoir from winter storage in Pueblo Reservoir in 1981 based upon a request of the Kansas representatives. The U.S.G.S. concluded, consistent with its previous evaluation of winter storage in Pueblo Reservoir in 1975, that there was no indication of reduced inflow to John Martin Reservoir and that the evaluation suggested a possible increase. The U.S.G.S. duly reported its findings to the Administration at a special meeting on August 6, 1981. Annual Report, Arkansas River Compact Administration 44-49, 51 (1981). In light of the fact that the

Administration has agreed to investigate the operation of Pueblo Reservoir, the Kansas complaint does not raise a substantial question justifying an original action in this Court.

E. There Is Little Likelihood Of Injury To Kansas If The Administration Proceeds With Its Investigation.

Finally, a relevant consideration in making a judgment as to the practical necessity of an original forum in this Court is whether any delay while the investigation by the Administration proceeds is likely to work to the substantial detriment of Kansas. *See Texas v. New Mexico,* 462 U.S. 554, 568-69 (1983). In this case, there is little likelihood of injury to Kansas in the immediate future.

Not all water that crosses the stateline is divertible or usable in Kansas. *See Colorado v. Kansas,* 320 U.S. 383, 396 (1943). Article IV.D. of the Compact provides: "This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado . . . . Provided, that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction."

Even assuming that the Kansas allegations concerning post-compact developments in Colorado were true, those developments would not be in violation of Article IV.D. when those developments do not materially deplete the divertible and usable quantity of water available to water users in Kansas. In some years, more water crosses the stateline than is divertible or usable in Kansas. This has been the case in recent years. For example in 1985, the conservation pool in John Martin Reser-

voir[16] filled and excess water had to be released for flood control purposes. According to the records of the Operations Secretary for the Administration, the conservation pool is nearly full at the present time. Thus, there is little likelihood that Kansas could be injured in the immediate future if the investigation by the Administration continues.

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[16]John Martin Reservoir is the storage space created by John Martin Dam. Art. III.D. The reservoir is located on the mainstem of the Arkansas River in Bent County, Colorado, approximately fifty-eight miles upstream from the Colorado-Kansas stateline. Arkansas River Compact: *Hearings on S. 1448 Before the Senate Comm. on Interior and Insular Affairs*, 81st Cong., 1st Sess., 28, 32 (1949) (statement of General Hans Kramer, Retired, U.S. Representative, Arkansas River Compact Comm'n.). *See* attached Map of Arkansas River Basin. The reservoir had an original storage capacity of approximately 700,000 acre-feet, of which 420,000 acre-feet was initially allocated to water conservation. *Id.* at 33. A major purpose of the Compact was to apportion between Colorado and Kansas the benefits arising from the operation of the reservoir for conservation purposes. Art. I.A.

CONCLUSION

Colorado concludes by noting this Court's admonition in *Texas v. New Mexico,* 462 U.S. 554 (1983):

> Time and again we have counselled States engaged in litigation with one another before this Court that their dispute 'is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of the representatives of the States which are so vitally interested than by proceedings in any court however constituted.'. . .

Id. at 575 (citations omitted).

The principal allegation in the proposed complaint is that post-compact well development in Colorado has materially depleted the usable stateline flow of the Arkansas River in violation of Article IV.D. of the Compact. Investigation of this allegation calls for a high degree of expert and technical knowledge. However, even experts who are trained and experienced in conducting hydrologic investigations can differ in their interpretation of the technical facts. Colorado believes the Court should be sensitive to charges that one state or the other is using an investigation for the purpose of delay; but, in this case, Colorado does not believe the facts are susceptible to that construction. At bottom, the Kansas Attorney General simply disagreed with the cooperative approach to the investigation which the Administration adopted at its meeting on October 8, 1985. In Colorado's view, the Administration, unlike the Kansas Attorney General, recognized that the dispute was more likely to be "wisely solved" by a cooperative study than by litigation.

For the foregoing reasons, Colorado respectfully moves the Court to deny the motion for leave to file the complaint.

Respectfully submitted,

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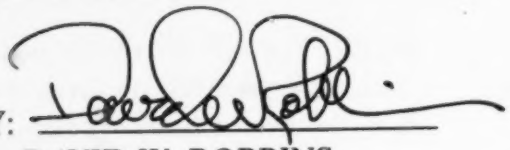
Chief Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

BY: 

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APPENDIX A

REMARKS OF THE U.S. REPRESENTATIVE TO THE ARKANSAS RIVER COMPACT ADMINISTRATION AT THE ANNUAL MEETING OF THE ADMINISTRATION HELD IN PUEBLO, COLORADO (DEC. 10, 1985)

The purpose of the Compact Administration is to settle disputes between Colorado and Kansas on the Arkansas River and to divide and apportion the waters of the river in an equitable manner.

Any suit brought in the Supreme Court of the United States by one state against another concerning the Arkansas necessarily reflects failure of the Compact Administration and demonstrates a breakdown both of the Administration and the settlement processes that the Administration was created to perform.

Attorney General Stephan reported to the Kansas Legislature that a concerted effort was made in 1984 by Kansas to submit its concerns on the Arkansas River to arbitration with Colorado but that the effort proved fruitless. He stated that there have been three years of efforts to attempt to negotiate, arbitrate or investigate Kansas concerns with Colorado, but, without success, and that he has directed Assistant Attorney General John Campbell and Mr. Simms to prepare the legal documents necessary to initiate litigation against the State of Colorado.

It is my view, from the position to which I have been appointed, that three elements should be necessary to establish a threshold for a suit by one state against another before the Supreme Court of the United States on a compact dispute. If there is a failure of a compact commission to resolve a dispute where the compact had provision for allowing federal representatives a vote (not the case here) or providing for arbitration by federal official (as is the case with this compact) these elements seem appropriate.

First, the underlying factual basis of any dispute should be presented clearly and fully before a regular meeting of the Compact. The claim for relief or the basis for a complaint should be set forth in public and brought before a meeting of the Compact so that the Compact has the opportunity and, indeed, the duty fully to discuss and consider the subject of discord, the claim of injury or damage. The basis of the complaint should be presented at a public meeting and not a closed or informal session or in a committee meeting or in reports not brought to the compact itself.

We have consistently had a large attendance of interested water users and water authorities at the meetings of the Compact Administration. The water community of both states is entitled to hear the complaint of either. Indeed, it is my opinion that the deficiencies in the presentation of problems in the administration of the river and before the general public has caused delays in facing and defining the problems, in solution of these problems, if not exacerbation of the problems themselves. The public is entitled to the airing of the positions of both states and the airing of these problems is the first step towards the solution of the problems. This is a step that may not be ignored or omitted or slighted under the provisions of the Compact as I interpret its purpose and function.

Parliamentary procedures and the fine tuning of resolutions are a necessary part of the functions and deliberations of the Arkansas River Compact Administration, but they are not its principal business. Its principal business is the settlement of disputes, complaints, or grievances or maladministration or claims of injury or damage. These must be identified with specificity and clarity before the Compact Administration if they are to be resolved by the Compact Administration. There is a desire for a temperate and pleasant meeting, but if a suit is in the air, it should come before the Compact prior to being taken to court.

Second, the fact finding process must be pursued to the reasonable limit by both states in order that disputes be resolved. This process has been employed with substantial success and progress by both states in the past year. The Compact has in the past successfully pressed forward on the establishment of facts, a data base, and in resolution of the concerns of both states in the administration of the Arkansas River based upon the factual determinations made. In addition, the Compact has been successful in its special relationships with the agencies of the United States in obtaining studies and reports, some of which have been of great value. I point out particularly the "travel time study" which has become a useful working tool for the administration of the river.

It is not appropriate for me to comment upon or pass judgment upon the deficiences of the fact finding process which appeared in the past few months. If one state refuses to permit fact finding on a practice deemed by the other state to be the cause of great injury, then the process breaks down at that point. This may be the case here. It is appropriate for me to say that both states must make greater efforts to define and to agree upon all of the regime of the Arkansas river and upon the data, the data base, and the facts of operation of the structures in the basin as they may bear upon the regimen and operation of the river and upon the complaints of any state. I believe many of these factual bases have been readily and freely agreed to by the states. In some instances, the facts have been agreed to but we may have fallen short upon the appropriate interpretation of the factual bases.

Third, in the event of the failure to agree between the two states, it is necessary and, indeed, essential that there be an arbitration of the dispute. At the minimum the states should exhaust the arbitration process. The Supreme Court of the United States in Texas vs. New Mexico at 103 S.Ct. 2571 stated that: "Time and again we have counselled States engaged in

litigation with one another before this Court that their dispute 'is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of the representatives of the States which are vitally interested than by proceedings in any court however constituted.' " A case given to the Supreme Court from a dispute over an interstate stream almost invariably ends up before a special master who may or may not have the qualifications, expertise, and experience appropriate to determine those matters. The court would acknowledge that there is in regular attendance before this Administration a group of men with skill, judgment, knowledge and experience superior to any other group on the complex issues of the river. The skills and abilities here should be utilized. In any event, before the compact's functions are at an end there must be a genuine effort to resolve disputes by arbitration.

One of the functions of the administration is to refer matters for arbitration. This necessarily involves several steps. One, is the establishment of the ground rules for arbitration of disputes before the Compact Administration. This step has not been taken. Cogent and thorough arbitration procedures have not been submitted by either state for action by the Compact to my knowledge. There have been discussions about arbitration, but I know of no framework which has been established by the Administration.

Next, those matters to be subjected to arbitration must be defined with clarity and precision. The arbitration procedure must run its course. These steps have not been accomplished in my judgment. It is not my intention to frustrate or thwart the remedy of either state, much less to define what those remedies shall be. It is my purpose to set forth those procedures which appear to me clearly to be reasonable and necessary before either successfully claims that its administrative remedies have been exhausted and that it must seek relief outside or beyond the Compact Administration.

APPENDIX B

RESOLUTION OF THE ARKANSAS RIVER COMPACT ADMINISTRATION REGARDING CONTINUED INVESTIGATION OF ALLEGED COMPACT VIOLATIONS SET FORTH IN THE RESOLUTION OF MARCH 28, 1985, AS AMENDED ON JULY 12, 1985

WHEREAS, pursuant to the Resolution of March 28, 1985, an Investigation Committee was constituted to investigate alleged violations of the Arkansas River Compact; and

WHEREAS, in conjunction with existing data and engineering studies the Committee agreed to prepare a series of single and double mass diagrams to analyze preliminarily the regimen of the Arkansas River; and

WHEREAS, the Colorado representative to the Investigation Committee has concluded that further investigation of whether the waters of the Arkansas River have been or are being materially depleted in usable quantity or availability should first examine: 1) reduced diversions by ditches in Colorado Water District 67; 2) the operating plan for John Martin Reservoir; 3) decreased plains precipitation; and 4) soil conservation measures; and

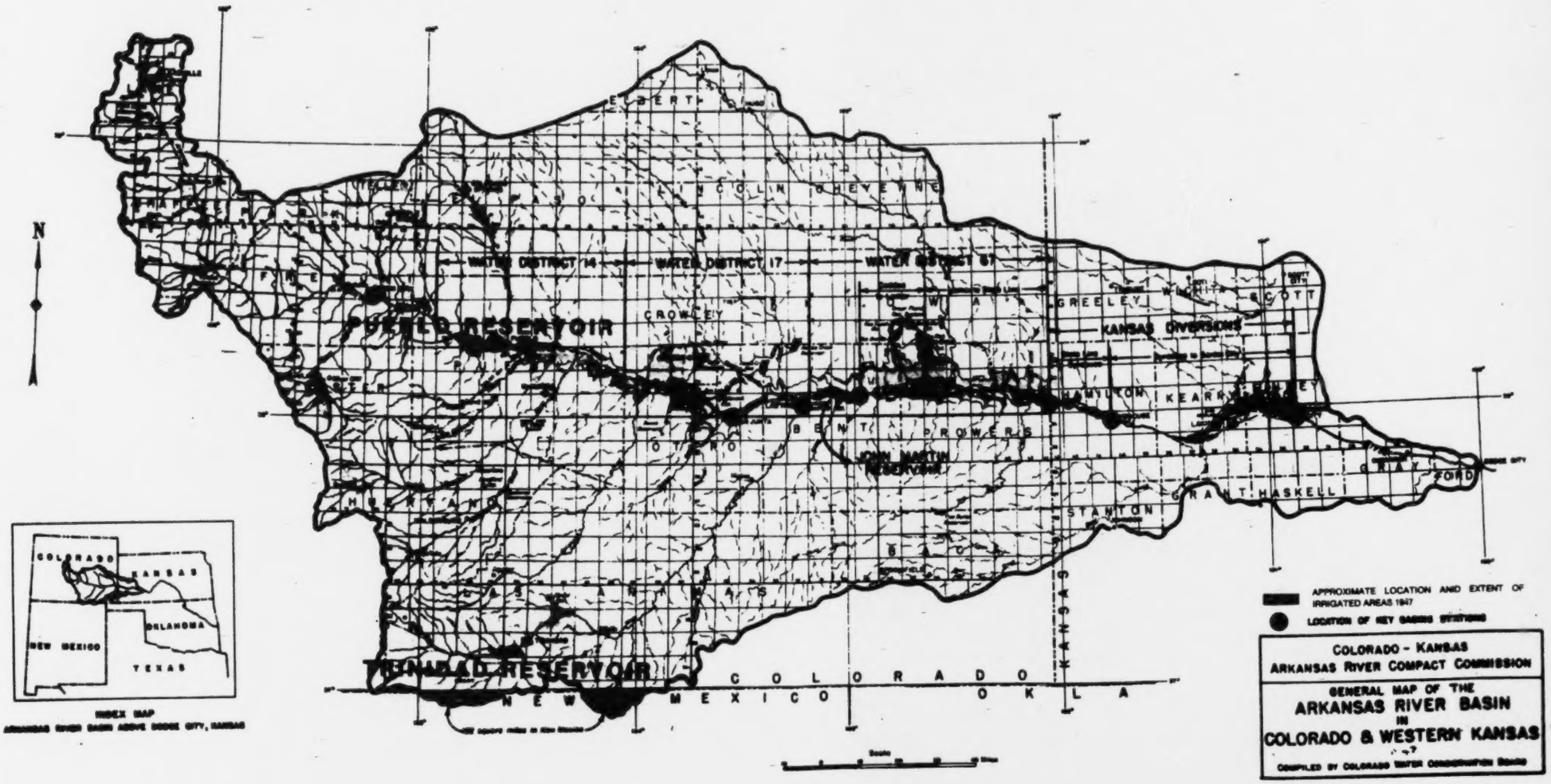
WHEREAS, the Kansas representative to the Investigation Committee has concluded that further investigation of whether the waters of the Arkansas River have been or are being materially depleted in usable quantity or availability should examine: 1) development and use of alluvial wells in Colorado; 2) precompact use of the conservation pool of John Martin Reservoir; 3) transmountain return flows; 4) post-compact development and use of upstream storage reservoirs; 5) tributary inflows and precipitation records; 6) extreme flood events and their impact on streamflow data; 7) surface diversions in Colorado Water Districts 67, 17, and 14; 8) development of stock

ponds in Colorado and their potential impact on tributary inflow to the Arkansas River; 9) the impacts of the 1980 Storage Resolution for John Martin Reservoir on the relationship of usable stateline flows to upstream flows; and 10) tributary inflows from the eastern plains of Colorado;

NOW, THEREFORE, BE IT RESOLVED by the Arkansas River Compact Administration that the Investigation Committee constituted by the Resolution of March 28, 1985, as amended on July 12, 1985, shall continue with its investigation of the matters upon which the Committee has mutually agreed that further investigation should be undertaken.

The foregoing resolution was adopted by the Arkansas River Compact Administration at a special meeting held on October 8, 1985, in Garden City, Kansas.

Frank G. Cooley, Chairman	Leo Idler, Recording Secretary



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